No. 85-993

IN THE

# Supreme Court of the United States

October Term, 1985



PAULA A. HOBBIE,

*Appellant,*

v.

UNEMPLOYMENT APPEALS COMMISSION AND LAWTON AND COMPANY,

*Appellees.*

## ON APPEAL FROM THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA FIFTH DISTRICT

## BRIEF OF THE RUTHERFORD INSTITUTE, AND THE RUTHERFORD INSTITUTES OF ALABAMA, CONNECTICUT, DELAWARE, GEORGIA, KENTUCKY, MICHIGAN, MINNESOTA, MONTANA, PENNSYLVANIA, TENNESSEE, TEXAS, AND VIRGINIA, AMICI CURIAE, IN SUPPORT OF THE APPELLANT

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## TABLE OF CONTENTS

## Table of Authorities

### Cases





### Statutes



### Other Sources

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## INTEREST OF AMICI CURIAE[1]

This case presents important issues concerning the rights of religious persons who are recipients of government benefits. This Court has long recognized the principle that general welfare benefits must be dispensed without the imposition of special burdens on the free exercise rights of the recipients thereof, particularly when there are less restrictive means to accomplish the governmental interest in the efficiency or administrative convenience of its welfare system. The Rutherford Institute believes that the decision of the District Court of Appeal was incorrect and should be reversed.

[1]Counsel of record to the parties in this case described above have consented to the filing of this brief and letters of consent have been filed with the Clerk pursuant to Rule 36.

*Amici Curiae* are non-profit religious corporations named for Samuel Rutherford, a 17th-century Scottish minister and rector at St. Andrew's University. The Rutherford Institute is composed of attorneys, judges, physicians, law students, educators and other citizens dedicated to the protection of religious liberty and other constitutional guarantees. With state chapters in Alabama, Connecticut, Delaware, Georgia, Kentucky, Michigan, Minnesota, Montana, Pennsylvania, Tennessee, Texas and Virginia, and its national office in Manassas, Virginia, the Rutherford Institute has undertaken to assist litigants and participate in significant cases relating to First Amendment religious freedoms. The Rutherford Institute seeks to promote, assure and enhance the freedom of religious persons in the proper exercise of their faith in conformity with the protection afforded by the United States Constitution.

Because of its acute sensitivity to violations of the freedom of religion, the Rutherford Institute has increasingly become one of the nation's most effective and responsible commentators in this important field. Moreover, counsel for *amici curiae* have specialized in litigation in state and federal courts and have participated as counsel for *amici curiae* in previous cases before this Court. The Rutherford Institute believes the expertise of its counsel will be of assistance to the Court in this case.

## Statement Of Facts

*Amici Curiae* adopt by reference the statement of facts as set forth in Appellant's brief filed with this Court.

## Summary Of Argument

The only question presented in this case is whether Mrs. Hobbie's Sabbatarianism, which caused her dismissal from employment, disqualifies her from receiving state unemployment benefits solely because her religious convictions were newfound. The State of Florida invites this Court to relax the protection afforded by the Free Exercise Clause under such circumstances, but this invitation should be categorically rejected as inconsistent with the spirit and intent of this Court's free exercise decisions in



*Sherbert v. Verner,* 374 U.S. 398 (1963), *Thomas v. Review Board,* 450 U.S. 707 (1981) and *Bowen v. Roy,* ____ U.S. ____, slip op. (June 11, 1986).

The State of Florida's denial of benefits to Mrs. Hobbie on grounds of "misconduct" arising from her sincerely held religious beliefs has impermissibly burdened the practice of her religion. The State's unemployment compensation scheme is unduly burdensome on two points. First, it imposes a state badge of "misconduct" on the practice of her sincerely held religious beliefs. Second, it imposes a penalty on the exercise of such beliefs by denying benefits otherwise available. This pressure upon Appellant to modify her behavior or to violate her beliefs is at war with her rights under the Free Exercise Clause. Moreover, applied in the context of one who has changed her religious beliefs and practices, the state policy demonstrates an animus against anyone who would change his or her belief structure. This official hostility to religious liberties, in general, and religious conversion, in particular, cannot be permitted to stand.

Appellees attempt to distinguish this case from *Sherbert* and *Thomas* on grounds that it was Appellant who caused the unemployment by asserting newfound religious practices. It is further argued that, in the earlier cases, it was the employer who caused the conflict which led to the unemployment. This distinction is illusory. It ignores the fact that the burden on religious beliefs and practices is the same in either instance. Moreover, the essential constitutional question in free exercise cases has always been the sincerity of religious beliefs and practices, not the timing of the acquisition and assertion of religious practices. *West Virginia v. Barnette,* 319 U.S. 624 (1943); *United States v. Seeger,* 380 U.S. 163 (1965); *United States v. Ballard,* 322 U.S. 78 (1944); *Bowen v. Roy,* ____ U.S. ____, slip op. (June 11, 1986); *see also Callahan v. Woods,* 658 F. 2d 679 (9th Cir. 1981), and *Key State Bank v. Adams,* 360 N.W. 2d 909 (Mich. Ct. App. 1984).

This Court's recent decision in *Bowen v. Roy,* ____ U.S. ____, slip op. (June 11, 1986) also supports Appellant's position. There, the Court indicated that when a state

created a mechanism for individualized exemptions, "its refusal to extend an exemption in an instance of religious hardship suggests a discriminatory intent." *Id.* at 14. In this case, Florida's blanket determination that religious practices arising from employee religious conversions is "misconduct" in all cases exhibits impermissible state hostility toward religion.

The State's assertion that the Establishment Clause is a compelling state interest justifying the denial of benefits has previously been rejected in *Sherbert* and *Thomas*. Moreover, under the reasoning of this Court's recent decisions in *Widmar v. Vincent*, 454 U.S. 263 (1981); *Lynch v. Donnelly*, ___ U.S. ___, 104 S. Ct. 1355 (1984) and *Witters v. State Commission for the Blind*, ___ U.S. ___, 106 S. Ct. 748 (1986), state provision of unemployment benefits to persons unemployed because of the exercise of their religious beliefs would not violate the classic tripartite test. *Lemon v. Kurtzman*, 403 U.S. 602 (1971). Finally, in *Bowen v. Roy*, ___ U.S. ___, slip op. at 18 n. 19 (June 11, 1986), this Court clearly stated that an exemption to accommodate religious beliefs would not violate the Establishment Clause.

## ARGUMENT

### I.

### State Denial Of Unemployment Compensation Benefits To An Individual Who Refuses To Act In Violation Of Her Religious Practices Constitutes An Impermissible Burden On Free Exercise.

In an apparent attempt to obfuscate the central question in this case, the State of Florida has painted the issues in very broad strokes. According to its Motion to Dismiss or Affirm, the issues are: (1) whether an employee can "force her employer to change the conditions of her employment to accommodate her new religious convictions" and (2) whether a state must provide "special treatment" to a person who becomes unemployed because of newfound religious convictions. *See Motion to Dismiss or Affirm*, pp. 17-18. The fallacy in this portrayal of the issues is patently evident. First, the dispute is not whether Mrs. Hobbie can force her employer to accept her back to work or can force her employer otherwise to accommodate her religious beliefs and practices; rather, it is whether the State of Florida can lawfully deny unemployment compensation benefits based on alleged employee "misconduct" arising from sincerely held religious convictions.[2] Second, with respect to mandatory "special treatment," the question is not whether states must give "special treatment," but whether the Free Exercise Clause protects against state discrimination imposed against persons who become unemployed because of their religious practices.



The State's portrayal of the issues notwithstanding, the only question presented by this case is whether Mrs. Hobbie's Sabbatarianism, which caused her dismissal from employment, disqualifies her from receiving state unemployment compensation benefits solely because her religious convictions were newfound. The State invites this Court to relax the protection afforded by the Free Exercise Clause on these facts, suggesting a parsing of the record that amounts to nothing more than an over-simplified "who struck John first" analysis. If the employer acted

[2]Even if Mrs. Hobbie's employer did establish lawful policies that discouraged church attendance or otherwise failed to accommodate her religious practices, this does not mean that such policies can be engrafted without consequence onto state law in a manner that effectively interferes with individual free exercise rights. The state and private action dichotomy is basic to constitutional theory. *See e.g. Burton v. Wilmington Parking Authority*, 365 U.S. 714 (1961); *Moose Lodge v. Irvis*, 407 U.S. 163 (1972). It would be mistaken to permit the State to be shielded by a corporation's private discretion. Although even corporate discretion is limited (*see e.g.* 42 U.S.C. 2000a *et seq.*), the State is accorded a far narrower scope in which to justify its actions and, in any event, although a corporation may lawfully impose burdens on an employee's religious activities, the State may not.

Further, the State's assertion that its benefit payments will adversely affect the employer's pecuniary interests is of no constitutional significance. Aside from the fact that the State does not have standing to raise claims on behalf of the employer, this argument must also fail because unemployment compensation benefit *contributions* by

first to violate her religious practices, state benefits would be granted, but if not, state benefits would be denied on the logic that the employee's action precipitated the unemployment. This approach should be categorically rejected as inconsistent with the spirit and intent of this Court's free exercise decisions. The state-imposed "badge" of misconduct and the State's denial of unemployment compensation benefits in this case impermissibly burden Mrs. Hobbie's free exercise of her religion. *Sherbert v. Verner,* 374 U.S. 398 (1963); *Thomas v. Review Board,* 450 U.S. 707 (1981).[3]

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*(footnote 2 continued)*

employers are merely part of Florida's method of raising revenue for welfare purposes. Thus, Florida's decision to tax employers, rather than the public at large, to cover unemployment welfare makes any payment from the public fisc to Mrs. Hobbie no more of a burden to the employer than would a payment to any of its former employees who likewise had a legitimate claim to benefits. Any harm to the employer is at most remote and indirect. *See FLA STAT* Section 443.131(3)(b).

Despite Appellees' protestations to the contrary, the decision in this case must be based on the State's responsibility to compensate Appellant's unemployment, as it would for anyone else who was unemployed for legitimate, even constitutionally protected, reasons.

[3]Appellees try to deemphasize the moral nature of "fault," in the Florida statute, by citing *Slusher v. State Department of Commerce,* 354 So. 2d 450 (Fla. 1st DCA 1970). *See Motion to Dismiss or Affirm* at p. 19. *Slusher,* however, never mentions "fault" at all. Further, Ms Slusher quit her job because she was moving, whereas Mrs. Hobbie was dismissed against her will because she worshipped on Saturdays. The Constitution expressly protects free exercise of religion, but not the option of relocating one's residence.

Appellees also conveniently omit from their Motion to Dismiss or Affirm the statutory definition of "misconduct" contained in *FLA STAT* Section 443.101 (1981):

> "Misconduct" includes, but is not limited to, the following, which shall not be construed in pari materia with each other:
>
> a) Conduct evincing such willful or wanton disregard of an employer's interests as is found in deliberate violation or disregard of standards of behavior which the employer has the right to expect of his employee; or



In *Sherbert* and *Thomas,* this Court established a clear rule as to the unconstitutionality of placing conditions, repugnant to an individual's religious beliefs, on the receipt of public benefits.[4] In deciding the validity of state-imposed conditions on the award of benefits, the Court first determined whether the particular statute or state practice burdened the claimant in freely practicing his or her religious convictions. If there was a burden, this Court then ascertained whether the State had demonstrated a compelling interest to justify the infringement. If there was no compelling state interest, the State was required to demonstrate that there was no less restrictive means to

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*(footnote 3 continued)*

> b) Carelessness or negligence of such a degree or recurrence as to manifest culpability, wrongful intent, or evil design or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his employer.

Moreover, the same District Court of Appeal, from which this appeal proceeds, held in *Erber v. Federal Express Corporation,* 409 So. 2d 522 (Fla. 5th DCA 1982) that a substantial degree of moral scienter is necessary for benefits to be withheld. In that case, the Court stated, "Just because [appellant's] actions may have warranted his dismissal from unemployment does not mean he cannot receive unemployment benefits," and "the actions of the appellant do not amount to such willful or wanton disregard, or culpability or evil design, etc. to warrant a disallowance of unemployment benefits." *Id.* at 524. Other more recent cases are to the same effect. *Sears Roebuck and Co. v. Unemployment Compensation Commission,* 463 So. 2d 465 (Fla. 3rd DCA 1985) (sexual advances to coworker); *Hines v. Department of Labor and Employ Sec.,* 454 So. 2d 1104 (Fla. 3rd DCA 1984) (belligerent refusal to work). Despite Appellee's attempt in this court to portray Appellant as a "conspirator" seeking to avoid company policy, the record is clear that Appellant attempted to cooperate and continue working and did not demonstrate an evil or improper motive for her conduct.

[4]This does not mean *Sherbert* was the first case condemning unconstitutional conditions. For a review of earlier cases see *Note, Unconstitutional Conditions,* 73 Harv. L. Rev. 1595, 1599 (1960), which states, "Denying a benefit because of the exercise of a right in effect penalizes that exercise making it tantamount to a crime. Punishing constitutionally protected activities seems clearly a violation of substantive due process."

accomplish its objectives. *Sherbert v. Verner*; 374 U.S. at 403, 407; *Thomas v. Review Board,* 450 U.S. at 717-18.

The claimants in *Sherbert* and *Thomas* were, in effect, required to choose between violating their basic religious principles and working, or obeying their religious principles and not working.[5] To further complicate their choice, if they chose to obey the mandates of their religious beliefs, the states would not award them unemployment compensation benefits *because* of their choice. In both cases, this Court held that withholding benefits under these circumstances impermissibly burdened the individuals' free exercise rights. As this Court said in *Thomas v. Review Board,* 450 U.S. at 717-18:

> Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement is nonetheless substantial.

The Court also determined in *Sherbert* and *Thomas* that any state interest in limiting fraudulent claims was not compelling. Even if it were, there were less restrictive ways of limiting fraud, malingering and deceit. Likewise, absent a showing of administrative inconvenience and no other "strong state interest" that would justify the infringement, the state action in denying benefits was, in both cases, found to be constitutionally unjustified.

The situation in the instant case is more aggravated. Not only was Appellant faced with the choice of either working and violating her religious practices, or continuing Saturday observance of her Sabbath and becoming unemployed and forfeiting unemployment compensation benefits, but she was also faced, in effect, with a state animus against a change in her belief structure—i.e. the stigma of a state-imposed badge of "misconduct" for her actions. She chose to abide by her convictions and suffer the consequences. However, the pressure not to change her beliefs or to modify her behavior, as well as the pressure to violate her beliefs—indirect though it may have been—was substantial, and an infringement of her rights. There is, therefore, absolutely no distinction between *Sherbert, Thomas* and this case, either with respect to the action taken or the burdens imposed by the State, except, perhaps, that in the instant case, Mrs. Hobbie has also borne the opprobrium of a state finding of "fault" and "misconduct" in the exercise of her faith and the consequent loss of her job.[6]

[5]Mrs. Sherbert was discharged because she refused to work on her Sabbath. She was subsequently denied benefits because she refused to accept other available work on her Sabbath. Mr. Thomas was forced to quit work when his employment duties forced him to violate his religious practices. He was denied benefits because the employer alleged he left employment voluntarily.

[6]Although the sincerity of Mrs. Hobbie's beliefs are recognized by both parties (see *Record* at 70), the centrality of the affected practice to her religious beliefs may provide protection beyond that of other specially protected religious activity. As Professor Tribe has posed it:

> Closely related to the question of sincerity is the element of how central or essential to the religion is the practice prohibited by the prohibition or requirement. Clearly a conflict which threatens the very survival of the religion or the core values of a faith poses more serious free exercise problems than does a conflict which merely inconveniences the faithful.

L. Tribe, *American Constitutional Law,* Section 14-11 at 862 (1978).

Thus, this Court did not find it excessively entangling to explore Amish life and culture to discern how their religious beliefs and practices would be burdened by the compulsory education law. *See Wisconsin v. Yoder,* 406 U.S. 205 (1972). The centrality of Appellant's Sabbatarian views is immediately apparent in that her particular denomination found them so fundamental that they derive their name from this doctrine. The fact that Appellant is a "Seventh-day Adventist" shows that this part of her faith is not only a core value, but also goes to her very identity. Further, the emphasis placed on Sabbath worship in Adventist theology may further buttress the notion that this belief is central to their religion. For the view of two leading Adventist authors, consider the following statements.

"In a special sense the Sabbath teaches us to respond in an orderly manner to God on His Holy Day. Such a regular response requires a deliberate interruption of all secular activities. We have just seen that

Appellees distinguish these two cases from the instant case, arguing that Appellant, whose beliefs were acquired after she began employment, caused the unemployment and should, therefore, be ineligible for benefits.[7] The proposed distinction is illusory. First as previously demonstrated, the burden on free exercise rights is the same regardless of when religious convictions are acquired or who initiates the conflict between requirements of employment and conscience. As Judge Arlin Adams concluded in *Callahan v. Woods,* 658 F. 2d 679, 687 (9th Cir. 1981), a case where a father's refusal on religious grounds to obtain a Social Security number for his daughter was upheld against a constitutional challenge, "so long as one's faith is religiously based at the time it is asserted, it should not matter, for constitutional purposes, whether that faith derived from relevation, study, upbringing, gradual evolu-

*(footnote 6 continued)*

this act of resting to honor God represents in itself a most meaningful *worship* response" (emphasis added). S. Bacchiocchi, *Divine Rest for Human Restlessness,* at 180-81 (1980).

"So far we have seen that the Sabbath is essentially the seventh day on which no work is to be done. Though this is a correct definition of the Sabbath it is undoubtedly too narrow. The Sabbath is much more than just a 'secular' day of freedom and the seventh day without work. It is also a religious day, a festal day, and a day of worship." N. Andreasen, *Rest and Redemption,* at 60 (1970).

[7]Although Appellees assert that the agent of change was Appellant, the record indicates that the change, in this case, came from the employer's management. In the language of the Appeals Referee, "The store manager and the claimant worked out a compromise which allowed him to cover for the claimant on Friday nights and Saturdays, in return for which she would work evenings and Sundays for the manager." *Notice of Decision of Appeals Referee,* at 1. Later, after the employee made this accommodation, the general manager demanded a change in the status quo by ordering that she either begin working on Friday evenings and Saturdays or resign. Thus, the employer's accommodation, which was acceptable to Appellant, was later changed by upper management. Appellant was given the ultimatum by which she was forced to either cease her Saturday worship or lose her job. Therefore, even if the State's fine distinctions about the "agent of change" are indulged in this case, from a technical standpoint, Mrs. Hobbie was *not* the agent of change.



tion, or some source that appears entirely incomprehensible." Likewise, the sincerity of Mrs. Hobbie's decision to honor her Sabbath is the relevant constitutional issue, not the when and how of her exercise of that practice.

It is also fundamentally inconsistent to assert that Sherbert's and Thomas's refusals to violate their religious convictions were for "good cause(s)," but that Appellant's refusal constitutes "misconduct." If there is a distinction, it is that Appellant's situation should receive more protection because her refusal to resign was a clear indicia that she wanted to be employed. The purpose of the Florida Unemployment Compensation Benefits Law is to "benefit ...persons unemployed through no fault of their own." *FLA STAT* Section 443.021. Classifying Appellant's belief that she must worship on Saturday as either a "fault" or "misconduct," both of which under standard dictionary definitions imply moral failings or defects, is contrary to the spirit and substance of this Court's previous decisions and the Free Exercise Clause.

The State's position, if allowed, would effectively coerce uniformity of faith and orthodoxy upon individuals who otherwise would receive benefits while they seek other employment suited to their religious practices. And, as this Court has observed, "[No] official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *West Virginia v. Barnette,* 319 U.S. 624 (1943).

That timing of the acquisition of religious beliefs is immaterial to the constitutional principles at issue is evident from other decisions of this Court. In *United States v. Seeger,* 380 U.S. at 167-68 (1965), one of the defendants, Jakobson, was convicted for refusing to submit to induction. Jakobson was originally classified under the standard draft classification, but for several years he intermittently enjoyed a student classification. Five years later, he claimed a noncombatant classification, as a conscientious objector. Finally, eight months later he requested a classification as a religiously exempted conscientious objector. He explained that his "religious and social thinking

had developed after much meditation and thought." *Id.* at 167. The Court found that his was a sincere religious belief placing him on common ground with those who had consistently held religious beliefs against war. Thus, this Court was not willing to distinguish Mr. Jakobson's newfound religious objections to war from the longer more stable beliefs of others exempted. There was no expression in *Seeger* about gearing the effect of an exemption to the date the war started or the date an objector became convinced of his beliefs or the date the government ordered him to duty. Time and the facts precipitating belief were largely irrelevant to the essential constitutional inquiry into the sincerity of beliefs. No less should be true for Appellant because of her conversion to Adventism.

In *United States v. Ballard,* 322 U.S. 78 (1944), Justice Jackson commented on religious experiences quoting William James:

> If you ask what these experiences are, they are conversations with the unseen, voices and visions, responses to prayer, *changes of heart,* deliverances from fear, inflowings of help, assurances of support, whenever certain persons set their own internal attitude in certain appropriate ways.

W. James, *Collected Essays and Reviews,* at 427-28, as quoted in *United States v. Ballard,* 322 U.S. 78, 93 (1944, Jackson, J., dissenting). The right of the free exercise of religion would have little substance if the right to change one's views resulted in adverse state action solely because of that change. Concepts of inquiry and growth are inherent in the very definition of religion. Both modern and traditional views of religion often express the necessity of a series of religious developments in the life of the believer. Conversion to a belief is an inescapable aspect of many religious experiences. Change may, in fact, be the norm, not the exception.

A recent Michigan Court of Appeals decision decided on substantially identical facts as the instant case is also instructive. In that case, a claimant became an Adventist after the commencement of her employment, and was dismissed for refusing to work on Saturday. *Key State Bank v. Adams,* 360 N.W. 2d 909 (Mich. Ct. App. 1984). The employer argued that the claimant was not entitled to unemployment benefits because "she chose, after beginning employment, to acquire religious beliefs which conflicted with the requirements of her job." *Id.* at 911. The Court of Appeals responded by stating that the determination of "whether the claimant can be viewed as being at fault is a determination which must be made in light of the First Amendment, not the language of the state statute." *Id.* at 912. The court further stated, "We do not accept the view that the First Amendment protects the right to adhere to religious beliefs, but not the right to adopt such beliefs in the first instance or convert from one faith to another." *Id.* at 913. The court ruled that the benefits should be awarded to the claimant, refusing to place her in an inferior category merely because she converted after her employment began.



This Court's recent decision in *Bowen v. Roy,* ____ U.S. ____, slip op. at 14 (June 11, 1986) also supports Appellant's position. Reaffirming *Sherbert* and *Thomas,* this Court observed:

> The statutory conditions at issue in those cases [*Sherbert* and *Thomas*] provided that a person was not eligible for unemployment compensation benefits if, "without good cause," he had quit work or refused available work. The "good cause" standard created a mechanism for individualized exemptions. If a state creates such a mechanism, its refusal to extend an exemption to an instance of religious hardship suggests a discriminatory intent. Thus as was urged in *Thomas,* to consider a religiously motivated resignation to be "without good cause" tends to exhibit hostility, not neutrality, towards religion.[8]

[8] "Indeed, five members of the Court agree that *Sherbert* and *Thomas,* in which the Government was required to accommodate sincere religious beliefs, control the outcome of this case...." *Bowen v. Roy,* ____ U.S. ____, slip op. (O'Connor, J., concurring).

Applying this analysis in the instant case, the Florida statute's procedure for determining "misconduct" establishes a mechanism for individualized exemptions. Moreover, the "misconduct" standard is more negatively value laden than is "good cause." The former intimates wrongful activity or improper behavior, whereas the latter connotes misdirection or mistaken reasoning. Therefore, if a religiously motivated unwillingness to work is without "good cause," and impermissibly exhibits hostility toward religion, then labelling Sabbatarianism as "misconduct," *a fortiorari,* exhibits hostility toward religion. Since the State of Florida has clearly defined "misconduct" with a distinct moral pejorative, the classification of Mrs. Hobbie's exercise of her faith as "misconduct" constitutes impermissible state hostility and discrimination.

If the Free Exercise Clause means anything, it prohibits at the very least governmental action which, in effect, brands religious conversion as a "fault" or "misconduct" and denies otherwise available monetary benefits to a person who loses his or her job because of beliefs or practices arising from a religious conversion. To hold otherwise would relegate the Free Exercise Clause to the dungheap of constitutional jurisprudence.

## II.

### The Establishment Clause Does Not Provide, On The Facts Of This Case, A Compelling State Interest To Justify The Burden Imposed Upon Appellant's Free Exercise Rights.

The burden imposed on Appellant's religious practices being the same in this case as in *Sherbert* and *Thomas,* it remains to inquire whether the State has demonstrated a compelling state interest to justify the infringement and, if so, whether there is a less restrictive means to accomplish the state objective.

The State asserts that Appellant demands "a rule of law providing more favorable treatment of persons who become unemployed for religious reasons than it provides



for those who become unemployed for equally compelling secular reasons." *See Motion to Dismiss or Affirm,* pp. 20-21. Such a rule, Appellees contend, would violate the Establishment Clause. Appellees rely on *Estate of Thornton v. Caldor,* ____ U.S. ____, slip op. (June 26, 1985), to support their position. *Thornton,* however, is not on point. That case involved state action that required employers generally to make affirmative religious accommodation to their employees. There is no such state-prescribed religious practice or institution imposed on employers in this case. Here, as in *Sherbert,* "the extension of unemployment benefits to Sabbatarians in common with Sunday worshippers reflects nothing more than the governmental obligation of neutrality in the face of religious differences and does not represent that involvement of religion with secular institutions which it is the objective of the Establishment Clause to forestall." *Sherbert* 374 U.S. at 407.

Appellees also cite *Everson v. Board of Education,* 330 U.S. 1 (1947) (see *Motion to Dismiss or Affirm,* p. 22), yet this Court, in *Everson,* observed "[a state] cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Nonbelievers, Presbyterians, or the members of any other faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation." *Id.* at 16. If the lower court decision is not reversed, Florida will have done what *Everson* said was proscribed.

In *Thomas v. Review Board,* 450 U.S. 707 (1981), this Court acknowledged, "[T]here is, in a sense, a 'benefit' to Thomas deriving from his religious beliefs, but this manifests no more than the tension between the two religion clauses." Any benefit in such cases is, however, merely incidental to the secular purpose and effect of "insuring employment opportunities to all groups in our pluralistic society." *Thornton,* ____ U.S. ____, slip op. (June 25, 1985) (O'Connor, J., concurring).

The State's argument that denial of unemployment benefits is compelled by the Establishment Clause is further discredited by this Court's holding in *Widmar v. Vincent,* 454 U.S. 263 (1981) and *Lynch v. Donnelly,* ____ U.S. ____,

104 S. Ct. 1355 (1984) and *Witters v. State Commission for the Blind,* ____ U.S. ____, 106 S. Ct. 748 (1986). In *Widmar,* this Court found that Establishment Clause obligations did not compel state discrimination against students who desired to use public facilities for religious speech. In *Lynch,* the Court determined that the display of a creche in a public park did not violate the Establishment Clause. And, in *Witters,* an award of vocational benefits was permitted to a blind student studying for the ministry, despite Establishment Clause concerns. In determining whether the state action in these cases violated or was compelled by the Establishment Clause, this Court applied the classic tripartite test. *Lemon v. Kurtzman,* 403 U.S. 602 (1971).

Applying this test, it is clear that the Florida Unemployment Compensation Benefits Law has the secular purpose of providing stopgap income during transition from one job to another. Moreover, the law's incidental benefit to Mrs. Hobbie in her observance of her Sabbath clearly does not advance religion. There is no empirical evidence that unemployment compensation would be awarded primarily to Seventh-day Adventists or to other Sabbatarians, or that it would substantially advance that practice. Benefits accrue to all eligible unemployed persons, religious and nonreligious. There is no "imprimatur" of state approval of religion, only a recognition of the values mandated by the Free Exercise Clause. The primary effect of the program cannot, therefore, be considered as other than purely secular in nature. Finally, there is no entanglement problem because the State must only make the factual determination of whether the claimant is sincere.

Because of the pervasive nature of modern state benefits, to argue against Mrs. Hobbie's right to receive benefits would be tantamount to sanitizing public life from any and all religious influence. "[No] institution within [society] can exist in a vacuum or in total or absolute isolation from all the other parts, much less from government." *Lynch v. Donnelly,* ____ U.S. ____, 104 S. Ct. 1355 at 1359 (quoting *Zorach v. Clauson,* 343 U.S. 306 at 314, 315 (1952)). The State of Florida must be pre-



disposed not merely to tolerate, but to accommodate Mrs. Hobbie's religious practices, particularly when the State's failure to make available otherwise generally available benefits impermissibly burdens the exercise of her faith.

Finally, in *Bowen v. Roy,* ____ U.S. ____, slip op. at n. 19 (June 11, 1986), this Court clearly stated that an exemption to accommodate religious beliefs would not violate the Establishment Clause. There is therefore no reason that an exemption to accommodate religious beliefs in this case would violate the Establishment Clause.

## CONCLUSION

The Framers of the Constitution were all too aware of the consequences of governmentally prescribed religious orthodoxy. Protecting the rights of those whose religious values seemed unusual or out of the ordinary was a primary concern to the near descendants of the State Church of England's dissenters.

The protection, however, goes deeper than safeguarding the beliefs of particular sects. It must reach to the individual liberties retained by the governed to order their lives in accordance with their values and principles. If people are in effect deprived of their right to observe their faith by undue governmental influence, the Constitution becomes a document of only historical interest, devoid of any real power to protect the people.

In this case, the State's denial of benefits casts too broad a shadow over protected liberty. The Court must, for this reason, reject the State's attempt to unfairly burden the claimant's religious practices and reverse the District Court of Appeal decision.

Respectfully submitted,

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